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No. 607

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE BORDER LINE TRANSPORTATION CO., *Petitioner*

v.

SAUL HAAS, Collector of Customs, *Respondent*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit With Brief

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THE BORDER LINE TRANSPORTATION CO., *Petitioner*

v.

SAUL HAAS, Collector of Customs, *Respondent*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit With Brief

Above-named petitioner prays that a writ of certiorari be issued to review the judgment herein (R. 91) of the United States Circuit Court of Appeals, ninth circuit, affirming a judgment (R. 44) of the United States district court for the western division of Washington, northern division.

1) **Opinions below:** The opinion of the trial court (R. 79) is unreported. The opinion of the circuit court of appeals (R. 86) is reported in 128 F 2d 192.

2) **Jurisdiction:** The judgment of the circuit court of appeals was entered May 18, 1942 (R. 91). A petition for rehearing was denied Aug. 14, 1942 (R. 92). Stays of judgment pending this application have been granted by

said court (R. 92) and a justice of this court. The jurisdiction of this court is invoked under 28 USC 347.

3) **Reasons for review**: Certiorari is requested on the ground that the appellate court:

a) Has decided an important question of federal law which has not been but should be settled by this court.

b) Has decided a federal question in a way probably in conflict with applicable decisions of this court.

c) Has rendered a decision in conflict with decisions of appellate courts in other circuits.

d) Has construed a federal statute inconsistently with the meaning of many statutes *in pari materia.*

e) Has rendered a decision in conflict with a number of rules of statutory construction.

4) **Statutes involved**: These are:

a) *General navigation fees*: The act of July 31, 1789, c. 5, sec. 29, 1 Stat. 29, 44, RS 2654, 19 USC 58, was a part of our earliest customs administrative law and is codified as follows:

> Sec. 58. Fees of collectors. Collectors shall charge and collect the following fees:
>
> 1. For every entrance of any vessel of 100 tons burden and upward, $2.50.
>
> 2. For every clearance of any vessel of 100 tons burden and upward, $2.50. . . .

Under the assumed authority of this statute, respondent collector of customs made exactions which petitioner contends should be refunded on the ground that the fees had

been abolished. Pertinent statutes, cited in the complaints (R. 7, 24; par. 7), are as follows:

b) *Fee revision for Canadian frontiers*: RS 4382, derived from act of July 1, 1870, c. 185, sec. 7, 16 Stat. 178, and resolution of Feb. 10, 1871, c. 27, sec. 2, 16 Stat. 595, in the following language reduced from $2.50 to 50 cents the fees for vessels navigating frontier waters "otherwise than by sea":

> Sec. 4382. The following fees shall be levied and collected from the owners and masters of vessels navigating the waters of the northern, northeastern, and *northwestern frontiers* of the United States, *otherwise than by sea*: . . .
>
> Twelfth. For the entry of a vessel direct from a foreign port, 50 cents.
>
> Thirteenth. For the clearance of a vessel direct to a foreign port, 50 cents.

Many other fees, not here pertinent, were also reduced by the same statute.

c) *Fee abolition for Canadian frontiers*: The act of Mar. 3, 1897, c. 389, sec. 9, 29 Stat. 687, 689, abolished fees which RS 4382 had reduced as above stated. It reads thus:

> Sec. 9. That fees for the entry direct from a foreign port and for the clearance direct to a foreign port of a vessel navigating the waters of the northern, northeastern, and *northwestern frontiers* of the United States *otherwise than by sea,* prescribed by section 4382 of the Revised Statutes, are abolished.

The expression above italicized, "northwestern frontiers, . . . otherwise than by sea," is common to the origi-

nal and amended forms of RS 4382, given above as (b) and (c), and is crucial in this case.

d) *General fee abolition*: Questions pertinent to this subject differ from those arising under the statutes above quoted, in that they are not limited to frontier fees but apply to navigation fees in general, and involve construction of a basically different provision in the tariff act of Oct. 3, 1913, c. 16, sec. iv, par. S, 38 Stat. 114, 201, as follows:

> S. That except as hereinafter provided, sections 1 to 42 both inclusive, of an Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, and all Acts and parts of Acts inconsistent with the provisions of this Act, are hereby repealed:
>
> Provided, That nothing in this Act shall be construed to permit any oaths to be demanded or fees to be charged except as provided in this Act or in section 2862 of the Revised Statutes of the United States . . .

Because the considerations peculiar to this Act are unlike those concerning RS 4382 and its repealer of 1897, they will be set forth separately, following the argument on those statutes.

5) **Important questions of federal law:**

a) This legal point of intrinsic importance is involved: Whether RS 4382 as amended, a remedial statute embracing generally all navigation on the Canadian frontier "otherwise than by sea," may by administrative action be applied preferentially, as has been done, to particular

waters, such as Saint Croix River, Passamaquoddy Bay, and analogous Alaskan waters, and its benefits withheld from other like waters. From the standpoint of public interest such administrative conflicts are as obnoxious as are conflicts between circuit courts of appeals.

b) Also, this litigation involves interpretation of a customs statute (par. S, tariff act of 1913, supra) obviously enacted to accord with a Presidential plan of customs reorganization which had been authorized by act of Aug. 24, 1912, c. 355, sec. 1, 37 Stat. 417, 434.

Neither of the questions thus raised has ever been presented to this court. Their importance to foreign trade and commerce is attested by the fact that they involve fees charged by customs officers daily at every American seaport.

In addition to the public interest involved herein is a substantial private interest, which is attested by the fact that 28 analogous cases are pending in the Court of Claims and the Seattle district court.

6) **Conflicting decisions, etc.**: Decisions, statutes, and rules, with which the decision below is alleged to be in conflict, will be specified under the heading "argument." Conflict with specific decisions seems insignifiant in comparison with the broad disregard of statutory implications and established principles, which is believed to characterize the decision below, and is mentioned in "reasons for review," supra, because regarded by counsel for petitioner as within the statement in rule 38—5 (a) that the reasons for certiorari therein mentioned are "neither controlling nor fully measuring the court's discretion."

7) **The facts**: According to the findings of the trial court petitioner is operator of an American and a Canadian steamship as common carrier of freight between points in the State of Washington and British Columbia, and respondent is collector of customs for the district of Washington, of which Seattle is chief port (R. 37, ii).

As exemplified by voyages between Vancouver and Seattle and return, upon entrance from or clearance to Vancouver the Seattle collector imposed the fees of $2.50 specified in the act of July 31, 1789, 19 USC 58, above set forth. Findings of fact (R. 36).

Petitioner conceded (R. 70) that since 1897 these fees had been collected by Seattle customs.

With the exception of voyages 46 and 47 (findings, R. 39—vi), as to which no argument will be made herein, the voyages in question were entirely upon inland tidal waters east, south, and southeast of Vancouver Island, on both sides of the international boundary. These waters extend from Olympia at the foot of Puget Sound to the northern end of the mentioned island, on Queen Charlotte Sound, roughly about 350 miles, and there is a western entrance from the Pacific Ocean, through the Strait of Juan de Fuca, between the island and Washington, about 60 miles long. This area contains many islands and peninsulas; and, varying greatly in width, it has many narrow straits, and other so-called inlets, bays, channels, and sounds. See chart (ex. 9, R. 58).

In addition to this extensive Washington region, other inland tidal regions of commercial importance along the Canadian frontier are Passamaquoddy Bay and the lower

Saint Croix River, between Maine and New Brunswick; also, contiguous to the Alaska-British Columbia boundary, are many large channels and bays.

Although these international waters of Washington and Alaska are geographically distinct, being separated by short stretches of open sea north of Vancouver Island, they are treated by this country and Canada as a single entity known as "sheltered waters" as distinguished from high sea. Note the Load Line Convention with Canada, which was proclaimed on Aug. 11, 1934, 49 Stat. 2685, and was negotiated as an exception to the International Load Line Convention, 47 Stat. 2238. For a distance of about 1000 miles these sheltered waters extend from Olympia at the southern tip of Puget Sound, and, reaching westward on Fuca Strait to a line beyond Port Angeles and Victoria, they continue northward along the inside line of Vancouver Island, up the coast of British Columbia, and through the Alaskan archipelago to Cape Spencer, in the latitude of Juneau. Therefore they include the Washington area about which this controversy centers.

8) **The basic issue**: Both courts held these fees to have been legally exacted, on the theory that the voyages in question had not, within the language of RS 4382 as amended in 1897, been over "the waters of the northern, northeastern, and *northwestern* frontiers of the United States *otherwise than by sea.*" The obvious fact that the pertinent frontier is "northwestern" was not questioned by respondent in either court, and was assumed by the court below without discussion (R. 86). This accorded with the decision by the same court, in *US v. One Gasoline*

Launch, 1904, 133 F 42. So the residual statutory question is whether, as held by the court below, the above-described tidal waters are "sea."

A novel and important question arises out of the fact that the court, without attempting to define the word "sea," and without holding that the waters of the involved Washington area were within the common meaning of that term, concluded that they should be regarded as "sea" because persisently so treated by local administrators of that area, notwithstanding that with greater persistence the word had been given a contrary meaning by the Treasury and Commerce departments.

9) **Subsidiary questions**: The brief statement just made hardly hints at many incidental legal points, such as are summarized below, together with the attitude of the appellate court toward them.

a) *Ambiguity—construction required*: Statutory ambiguity was the main premise of the decision below (R. 87), and the consequent doubt was resolved by applying adversely to petitioner the two important rules which are based upon administrative practice and upon statutes *in pari materia*. We do not concede ambiguity. However, if it does exist, it is urged that the mentioned rules apply in favor of petitioner, together with many other principles of statutory construction that are also favorable. These other rules are mentioned below, and will be discussed more elaborately under the head of "argument."

b) *Rule of doubt*: In stating and acting upon ambiguity in the statute the court necessarily recognized a plain doubt such as would justify application of the rule that

doubtful taxing statutes should be construed favorably to the citizen, especially in view of the analogy of such statutes to customs-fee enactments. The court tacitly disregarded that rule.

c) *Departmental construction*: Petitioner contended that a Treasury interpretation of RS 4382, in 1898, which was generalized by the customs regulations of 1915 and interrupted by those of 1931, but revived by a Commerce ruling in 1936, was a cogent indication of statutory meaning. But the court below made a finding of "consistent rulings of the department charged with the responsibility of enforcing the statute" (R. 87). These so-called "rulings" apparently were only a long practice by field officers in the single customs district of Washington (R. 87) which was inconsistent with the Treasury and Commerce rulings mentioned above.

d) *Statutes in pari materia*: In applying this rule the court referred to two irrelevant acts on collisions, and ignored twenty to thirty statutes and treaties, ranging from the preconstitution period of 1782 to 1941, which were cited by petitioner as using the term "sea" in a sense that included high sea and excluded inland tidal waters, and had related chiefly to such cognate subjects as frontier waters, commerce over those waters, customs administration on inland tidal waters, sea fisheries, and frontier fees. This impressive indication of legislative understanding elicited from the court only the comment that petitioner had cited "a number of acts of Congress in which the word 'sea' *is used in the sense of open sea or ocean*" (R. 89).

e) *Exterior vs. inland waters*: In addition to the persuasiveness of above-mentioned statutory discrimination between exterior and inland waters, petitioner contended that weight should be given to a like administrative practice, as well as to the international treatment of these very areas as "sheltered waters" as distinguished from ocean waters in general, under a convention with Canada. This point was not referred to in the opinion below.

f) *Stare decisis*: In 1840 an appellate court (Mr. Justice Story) had defined the words "at sea," as found in a statute administered by customs officers under Treasury supervision. Other federal jurists had manifested a like understanding of the term. Petitioner contended that the definition should have been followed herein. The decision below does not mention the subject.

g) *Legislative adoption of judicial definition*: It was also contended that the legislative and administrative sponsors of the fee legislation of 1871, RS 4382, had used the word "sea" in accordance with Mr. Justice Story's definition, especially as the decision containing the definition had been cited in the regulations of 1857 pertaining to the statute construed, and those regulations were in effect when the later law was passed. This was denied without specific mention.

h) *Legislative history of amendment of 1897*: It was explicitly stated in both House and Senate that the purpose of the fee abolition of 1897 was to remove a burdensome discrimination in favor of railroads and against waterborne commerce on our northern frontier, due to abolition of railway manifest fees, and petitioner contended that

this remedial legislation applied wherever rail and water competition existed along our frontiers. The contention was denied, apparently on the theory that the local practice in the single district was a paramount consideration.

i) *Frontier waters as a unit*: Petitioner contended that the frontier-waters acts applied uniformly to the entire northern boundary, and that departmental rulings and regulations treating the inland tidal regions of Maine and Alaska as "otherwise than sea" were applicable in principle to the analogous waters between Washington and British Columbia. This was denied, apparently on the theory that geographical uniformity was not required.

j) *Common meaning—controlling evidence*: On the theory that above-mentioned persisent legislative use of the word "sea," mentioned above in paragraph (d), supra, plus like frequent use by justices of the Supreme Court, constituted irrefutable evidence of the common meaning of that term, petitioner cited dozens of instances of that use in the sense of high sea, in opinions written by members of this court during a period of more than a century, including 1942. This exceedingly impressive showing, qualitative and quantitative, was disregarded without discussion.

k) *Words must be given meaning*: Petitioner's contention that the provision for waters on the "northwestern" frontier would be without meaning unless applied to the tidal areas here in question, was not mentioned by the court below.

l) *Change of language imports change in meaning*: In RS 4382 the word "waters," which is of the widest pos-

sible meaning, is used instead of the phrase "rivers and lakes" in the earliest (1831) fees statute on frontier waters. Petitioner cited this change of language as indicating a broader meaning of the present statute. This contention was tacitly disregarded.

10) **Summary**: The foregoing shows that to the prejudice of petitioner the court below virtually held that the practical interpretation by local officers at Seattle should prevail over interpretations by the Treasury and Commerce departments in which those officers were subordinate; also that incidentally two important rules of statutory construction—administrative interpretation and *in pari materia*—were misapplied in support of that conclusion, while about a dozen other rules of construction were ignored, which are generally regarded as helpful in extracting the legislative intention, and which herein militated unanimously in favor of petitioner. These various matters will now be presented more fully.

11) **Preliminary considerations**: In an approach to the underlying proposition that inland tidal waters are not "sea," some important distinctions should be noted between two classes of navigation which are common on the inland tidal waters of the Canadian frontier. First, the navigation may be by vessels "from the sea" or "to the sea," which as will hereafter appear (p. 37) are terms often used in analogous statutes. This would include a voyage between Seattle and an Asiatic port, or between Eastport and Halifax; which would be "by sea," because chiefly or substantially over the high sea. Alternatively, it might be wholly over inland frontier waters, as between Vancouver and Seattle, or between Saint Ste-

phens, New Brunswick, at the head of navigation on the Saint Croix River, and Eastport on Passamaquoddy Bay. Petitioner contends that the latter type of traffic is "otherwise than by sea," because wholly on inland waters, and that this conclusion is enforced by considerations to be presented under later headings.

Of perhaps greater signifiance are the peculiarities of the two classes of traffic. Generally speaking, if it is over the ocean large vessels are involved, on voyages that are long and infrequent, so that customs formalities and charges are of relatively little importance. But if navigation is merely on frontier waters, small vessels are prevalent, including tugboats, barges, ferry boats, and motor boats, and the traffic is largely of the short-haul or "shuttle" variety. Trips are many and brief, and vessels go from port to port on both sides of the international boundary, perhaps making a number of calls in a single day. Therefore, if Congress had not, as in title 34, chapter 11, Revised Statutes, minimized the requirements for commerce with Canada, customs technicalities and exactions would be exceedingly burdensome, and disproportionate to the importance of commerce of that type.

These considerations are pertinent to vessels plying across the Saint Croix and connecting waters, served by a dozen custom-houses, and to vessels traversing Washington and Alaskan frontier waters, with a greater number of ports of call, as well as to Lake Erie or Champlain or the international portion of Saint Lawrence River.

ARGUMENT—PART I

1) **Administrative practice:**

a) *Local action vs. departmental action*: The opinion below, after stating that "the word 'sea' has many meanings," adds (R. 87):

> This ambiguity, however, has been settled by the consistent rulings of the department charged with the responsibility of enforcing the statute. For nearly half a century the Treasury Department has been collecting fees in this area upon the theory that the waters in question were sea within the meaning of the statute. Such departmental construction of the statute is entitled to great weight and should not be upset except for the most cogent reasons. *US v. Hill*, 120 US 169; *Moore v. Carter Oil Co.*, 43 F 2d 322.

The so-called "consistent rulings" and "departmental construction" were held to control, though they related solely to local action and were in derogation of views persistently expressed by department heads and elaborately brought by petitioner to the court's attention, together with many relevant adjudications and statutes *in pari materia*. (This rather lengthy subject will be more conveniently presented under other headings.)

This is extreme doctrine and apparently without precedent. Its revolutionary character would be strikingly apparent in a case of wilful insubordination on the part of a local official, in which event it may be confidently assumed that no weight whatever would be assigned to it. The fact that departmental views may have been disregarded by oversight rather than by intention would give the local practice no higher status. In 31 Opns. Atty. Gen.

13, where a long-continued practice at a single port was urged as a reason for continuing an interpretation, it was said (p. 40):

> Nor have such practices been sanctioned by the Treasury Department. They have been permitted through ignorance or neglect of the customs officers directly in charge of the plant and . . . not been immediately discovered by their superior officers.

The practice of exacting these fees in the customs district of Washington may well have grown out of the fact that such collections at that port were partly for the personal pecuniary benefit of the collector (RS 2670); but whatever the explanation his duty was indicated by RS 161, as follows:

> The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks . . .

b) *Uniform construction imperative*: In addition to the question involved in the probably unconscious conflict between collector and Secretary is the point of geographical uniformity, rather than local application of a statute of general applicability. The court below doubtless ignored pertinent administrative and judicial interpretations on the theory that the Washington area could be treated as "sea," and the analogous areas of Maine and Alaska could be treated as "otherwise than sea." There seems to be no precedent for such discrimination.

The statute relates to "waters on the northern, northeastern, and *northwestern* frontiers otherwise than by

sea." A construction which in effect nullified one of those three enumerations would have the same result as though Congress had specified only the other two, and would be judicial legislation. This could be done either by holding that the waters in the Washington area are not on the northwestern frontier, or by holding that they are not "sea." The court regarded them as on that frontier, the same as in *US v. One Gasoline Launch,* 1904, 133 F 42, supra, but held that they were "sea."

The great specificness with which Congress has in so many statutes specified all frontiers, to wit, "the northern, northeastern, and northwestern frontiers," as in RS 3095-7 and 3109-11, indicates that complete coverage was intended, with uniform application of the law to the entire Canadian boundary from the Atlantic to the Pacific, and on the Alaska boundary. If, as held in rulings and regulations herein cited, the inclosed tidal waters of Maine and Alaska are not "sea," that is likewise true of analogous Washington areas. Geographically, each of these three well-defined regions is a species of a single genus, and if one species could be treated differently from the others, then subspecies could be likewise differentiated. The practice on Bellingham Bay northeast of Puget Sound might differ from that at Olympia at the foot of Puget Sound, or at Roche Harbor on Haro Strait, a few miles from Vancouver Island.

A "frontier," according to Webster's International Dictionary, is "that part of a country which fronts or faces another country"; and in its instant context, involving waterborne commerce between American and foreign ports, it is essentially spacious. It embraces the Great Lakes,

over 1100 miles long and "the most important unit of inland waterway transportation in the world" (10 Encyc. Brit. 730), including Lake Michigan, which is 320 miles long and does not touch the boundary line. So, the areas involved are of a magnitude which readily includes the entire Washington-British Columbia region.

In regarding the Washington portion of our frontier waters as *sui generis* for navigation-fee purposes, the court below is in conflict with the following decisions in analogous cases:

i) *US v. Darby,* 312 US 100, 123: Legislation aimed at a whole embraces all its parts.

ii) *US v. Pelzer,* 312 US 399, 402: Revenue laws "are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application." Uniformity is likewise desirable in laws governing trade with a contiguous country.

iii) *Maddock v. Magone,* 1894, 152 US 368: This is a customs-revenue case in which imported chinaware was claimed to be commercially known as "toys." The court said (p. 371):

> Necessarily the commercial designation is the result of established usage in commerce and trade, and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local, or personal . . . Recovery could not be had on a theory involving *different rates of duty at different ports of entry,* or distinct and differing designations.

The Seattle practice in the present litigation has not been general, but local and partial, and could be upheld

only on the theory above condemned, of different fee rates at different ports of entry.

iv) *Magone v. Wiederer,* 1895, 159 US 555: This is another customs case, and it was held that a tariff designation which connotes the use to which an imported commodity is to be put, such as "watch materials," means chief use. Therefore local usage would not satisfy the statute unless it were shown also to be general.

v) *Pacific Guano & Fertilizer Co. v. US,* 15 Ct. Cust. Appls. 218: Proof of chief use (80%, p. 227) of millions of pounds of imported tankage as "fertilizer" in California was held to be insufficient for its tariff classification as "substances used chiefly for fertilizer," because chief use was not shown *as a countrywide proposition.* That is, a heavily predominant use throughout a large region and in a large quantity is not sufficient to establish a tariff usage.

vi) *US v. Missouri Pacific,* 278 US 269: The report of this case in 73 L. ed. 322 contains an extensive annotation on "effect of practical or administrative construction of a statute on subsequent judicial construction." Under the subheading, "necessity that construction have been general" (p. 348), it is stated that "practical construction, to be of weight, *must have been general, not local, in its application";* and the statement continues (p 349):

> The general rule is inapplicable where the alleged departmental construction contended for has been *only a local practice* under a statute generally applicable. Union Traction Co. v. Chicago (1904) 209 Ill. 444, 70 NE 659.

vii) *Sanford v. Commissioner,* 308 US 39: In 84 L. ed. 49, 50, is cited to the same point *Nye v. Eddy,* 36 NM 169, 9 P 2d 1023, in which it was said that "interpretation of a statewide application is not to be controlled *by the practice in one county.*"

viii) *US v. Pine River Co.* (CCA 8) 89 F 907, 915:

> While it may be that proof of a customs or usage is sometimes admissible to aid in the construction of a statute as well as a private contract, yet when it is offered for that purpose, and with a view of altering the ordinary meaning of ordinary words or phrases, the evidence concerning the usage ought to show that it was *prevalent in all sections where the law was to become operative,* and was so far universal in the sections where it prevailed, as to leave no room for doubt that the usage was known to the lawmaker, and that the statute which it serves to modify was enacted with reference thereto.

Administrative usage is no less within this principle than commercial usage.

ix) *Anderson's Law Dictionary,* under "custom" and "usual": Customs and usages must be general, in order to have the force of law.

c) *Time-area uniformity*: The two decisions cited by the court below in support of its adoption of the local Seattle practice (R. 88) are readily distinguishable, because the geographical element of uniformity is absent.

i) *US v. Hill,* 120 US 169, related to the long-continued local practice of a clerk of court, which not only did not contravene departmental regulations but was sanctioned by three different departments and a number of judges in

the particular court. As said by the trial court and quoted by the Supreme Court (p. 180):

> It was begun by Judge Story and Judge Sprague, and has had the approval of all the judges of this district since their day. It has also had the sanction successively of the Department of the Treasury, the Department of the Interior, and the Department of Justice.

This differs sharply from the special situation of the northwestern frontier, where the local practice has been contrary to pronouncements by the Treasury and Commerce departments.

ii) *Moore v. Carter Oil Co.*, 43 F 2d 322, 324: This case is irrelevant, because it pertained to only the single factor of acts done under a statutory agreement with the Seminole Nation. No question was there involved of distinct and widely separated areas under different regional officers, but only the point of uniformity in time. Here, however, the added factor of area must be considered. This two-dimensional quality characterizes virtually every case in which administrative practice has been held to be material in statutory construction.

These two decisions are the only ones cited in the opinion below, and each is clearly irrelevant, because it relates to a single point as distinguished from an area, and because there was no conflict between field and departmental officials, such as exists here.

2) **Administrative practice—legislative history**: Under the previous heading we showed that the "consistent rulings by the department" mentioned in the opinion below

(R. 87), consisted merely of the local customs practice which existed in the district of Washington after 1897, assumably oral in form, rather than, as is usually the case, of written or printed rulings or regulations emanating from the office of the Secretary of the Treasury in the city of Washington. Under the present heading will be found many citations contrary to the local practice, including a ruling published in 1898 and interpreting non-committal regulations of 1890 and 1892, customs regulations issued in 1915, and a Commerce ruling made in 1936, together with many pertinent court decisions and legislative history. The importance and variety of these references will justify the following detailed statement.

a) *"Sea" statutes covered by regulations of 1857*: The legislative and departmental history of the phrase under consideration, "otherwise than by sea," is as follows. This crucial expression seems to have been first used in reference to navigation fees on our Canadian frontier in act of Mar. 2, 1831, c. 98, 4 Stat. 487. That was an act "to regulate the foreign and coasting trade on the northern, north-eastern, and north-western frontiers of the United States," and abolished customs fees on vessels *"entering otherwise than by sea,* at any port of the United States on the *rivers and lakes"* along the mentioned frontiers. That statute was repealed June 17, 1864, c. 130, sec. 7, 13 Stat. 134-5; but the phrase "otherwise than by sea" was restored in the resolution of Feb. 10, 1871, c. 27, sec. 2, 16 Stat. 595, RS 4382, and continued in the fee-abolition act of Mar. 3, 1897, sec. 9, 29 Stat. 687, 689, both of which are quoted above (p. 3).

Contemporaneous with the act of 1831 on frontier navigation "otherwise than by sea," were statutes authorizing customs officers to pay bounties upon fish caught "at sea." Acts of July 29, 1813, c. 35, sec. 5, 3 Stat. 49, 51; Mar. 3, 1819, c. 89, 3 Stat. 520; both repealed by act of July 28, 1866, c. 298, sec. 4, 14 Stat. 328. In force during 17 years of this period were General Treasury Regulations, 1857, superseded in 1874. They related to both of the two kinds of "sea" legislation then effective. As to the fee abolition of 1831 the regulations (art. 594) summarized the statute, without indicating what was to be regarded as "entering otherwise than by sea," at ports on frontier "lakes and rivers." However, as to sea fisheries they were extremely elaborate, and for the following reasons they are especially pertinent to the instant case.

b) *Judicial construction—departmental adoption*: In the sea-fishery acts of 1813 and 1819, supra, the word "sea" had been explicity construed in 1840 by Mr. Justice Story, on appeal from the Maine district court, in *The Harriet,* 11 F. Cas. 588, and had there been held not to include tidal waters, unless *extra fauces terrae.* The involved schooner hailed from Saint George (p. 595, col. 2), a town near Thomaston, Maine, and then a customs port of delivery (RS 2517 (8)), and the waters which were judicially regarded as non-sea were in the tidal region between Saint George and the local *fauces terrae,* probably about 15 miles away, according to Nautical Chart 1203, US Coast and Geodetic Survey.

The regulations (pp. 382-9) contained many references to "sea" fisheries; and highly material to the instant case is the fact that (p. 385) they cited above-mentioned case,

"The Harriet, 1 Story, p. 251," particulary to "the legal necessity of keeping journals or logbooks on board fishing vessels *at sea.*" Annotations of this character are common in such promulgations, and there would be no point in making them except when the decisions referred to have been departmentally accepted as authoritative. Indeed, the customs seizure upheld in that case was presumably based upon a like previous construction of the law by the Treasury.

In addition to being cited in the regulations of 1857 as noted above, the *Harriet* decision had been given unusual prominence by the fact that when the sea-bounty act of 1819 was published in 1846, in the first edition of Statutes at Large, the syllabus of the case as originally reported (1 Story 251, 11 F. Cas. 588) was set forth in full as a footnote, the third paragraph thereof being as follows (3 Stat. 520):

> 3. A vessel is "at sea," within the intent of the acts of 1813 and 1819, when she is without the limits of any ports or harbours on the seacoast.

More specifically, the opinion says (p. 591):

> When once any boat or vessel is out of the limits of our ports or harbors, *extra fauces terrae, vel portus,* the boat or vessel is in a legal, as well as in a nautical sense, at sea.

Concretely, the day of leaving port and the day of returning to port were excluded from the number of days which the statute required to have been "actually . . . employed . . . at sea." In other words, a fishing vessel was not "at sea" until free from inland waters and able

to carry on a sea fishery as distinguished from a bay or river fishery.

A like distinction between inland waters and "sea" was made in three other criminal cases decided in 1818 and 1829 by Mr. Justice Story (whose use of "we" indicates presence of another judge); to wit *US v. Haines,* 26 F. Cas. 62; *US v. Hamilton,* 26 F. Cas. 93, and *US v. Gardner,* 25 F. Cas. 1258. In each instance "sea" was used in the sense of high sea, as in the *Harriet* case.

Also, during the period here under consideration the same distinction was made by Judge Betts, in the southern district of New York, in these three instances: *The Wave,* 1831, 29 F. Cas. 453, 459, 461, applying the rule of headlands (fauces terrae) to lower New York bay; *Lears v. One Cask Oil,* 1842, 15 F. Cas. 105, and *The John Gilpin,* 1845, 13 F. Cas. 675.

These six cases will be dealt with under a later heading, "stare decisis," together with the case of *The Harriet* and many decisions rendered by this court during the earliest decades of our national history. They are mentioned as firmly supporting the presumption of administrative and legislative adoption of the persistent curial treatment of the term "sea" as synonymous with "high sea."

c) *"Sea" statutes of 1871 (RS 4382, 2584, etc.)*: Under above-stated circumstances of legislation, regulation, and adjudication, RS 4382 was enacted in reference to vessels:

> Navigating the waters of the northern, northeastern, and northwestern frontiers of the United States, otherwise than by sea.

Also, contemporaneous with RS 4382 were other customs statutes enacted in 1870-1 and codified as RS 2584-5 and 2588-90, and clearly using the word "sea" in the sense of high sea.

In RS 2584 the phrase "coming from or going to sea" was used with respect to the ports of San Francisco and Vallejo, it being provided that:

> Any vessel of 500 tons or over, *coming from or going to sea,* may proceed directly to or from the port of Vallejo, and report through the deputy collector at that port to the collector of customs at the port of San Francisco.

Manifestly the statutory "sea" from or to which the vessel came or went was high sea and not the deep tidal waters of the spacious bay of San Francisco, of San Pablo Bay to the north, and of Napa River on which Vallejo is located. RS 2585 has similar phraseology and implications for the port of Eureka on Humboldt Bay, and for the port of Wilmington (now Los Angeles harbor). Also, RS 2588-90 contain six references to "sea," meaning high sea in distinction from the extensive tidal reaches (about 120 miles) of the Columbia River below Portland, including the broad mouth of that great stream where it empties into the Pacific.

This exclusion of these four Pacific coast tidal areas from the category of "sea" is absolute and not merely inferential.

Now, when Congress in 1871 (RS 4382) reduced entrance and clearance fees on vessels navigating frontier waters "otherwise than by sea," the word "sea" was

presumably employed (a) in the same sense as that defined in the case of *The Harriet,* supra, which excluded tidal waters not *"extra fauces terrae,"* (b) in the same sense as in the case of *The Wave,* supra, which regarded the *fauces terrae* at Sandy Hook as fixing the place of separation between the tidal waters of the lower bay of New York and what was referred to as "the sea," or waters outside the Hook, (c) in the same sense as in five other Massachusetts and New York decisions cited above, and (d) in the same sense as that in RS 2584-5 and 2588-90, supra, contemporaneously enacted, in which the term "sea" excludes the tidal waters of San Francisco Bay, Humboldt Bay, Los Angeles Harbor, and the even more extensive tidal area of the Columbia, between Portland and the Pacific.

According to *Heald v. Dist. of Columbia,* 254 US 20, 23, it is:

> The settled rule that where provisions of a statute had, previous to their reenactment, a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary.

Further, when in 1870-1 Treasury officials sponsored these "sea" acts, relating respectively to frontier fees and to various Pacific ports and their interior tidal waters, it is hardly credible that they used the word "sea" in different senses. And, as the regulations of 1857 (as would otherwise be presumed) prove actual Treasury knowledge of the Story definition of "sea," it is unbelievable that the Treasury sponsors proceeded on the basis of any other meaning, especially as they were presum-

ably acquainted with the other above-cited court decisions on a like point.

Additional like evidence is afforded by comparison of the first fee-abolition act of 1831 with the fee-reduction statute (RS 4382). The earlier provision related to vessels:

> Entering otherwise than by sea, at any port of the United States on the *rivers and lakes* (of the frontiers).

The latter provision related to vessels:

> Navigating the *waters* of the northern, northeastern, and northwestern frontiers of the United States, otherwise than by sea.

Change in language imports change in meaning. This legal principle and a closely parallel state of circumstances are discussed in *Shamrock Oil & Gas Corp. v. Sheets,* 313 US 100. After narrating the history of legislation and incidentally quoting a House report concerning the substitution of new phraseology for old, Mr. Justice Stone said (pp. 106-7):

> We cannot assume that Congress, in thus revising the statute, was unaware of the history which we have just detailed, or certainly that it regarded as without signifiance the omission from the earlier act of the phrase "either party" and the substitution of the phrase authorizing removal by the "defendant or defendants" in the suit . . .

The new expression, "waters," is of the broadest possible meaning; for it includes any body of water whatever, whether salt or fresh, interior or exterior, and is

commonly used in customs laws and other federal statutes where no limitation is intended, as in RS 2517 to 2603, which define dozens of customs districts as comprising certain described "waters and shores."

By contrast, the term "rivers and lakes," used in 1831, necessarily included only frontier waters within the meaning of those two names. Therefore, when RS 4382, instead of "rivers and lakes," used the broader expression "waters of the . . . frontiers of the United States, otherwise than by sea," the intent was clear to include not only frontier lakes and rivers, but other navigable areas which are not "sea." The only possible waters of this description are such inland tidal regions as (a) Passamaquoddy Bay, (b) Puget Sound and connecting areas, and (c) Portland and Lynn canals and other bays and inlets that are numerous along the extensive frontier of Alaska.

This coincides with the judicial use of "sea" in the *Harriett* and *Wave* decisions, supra, as well as congressional use in the closely contextual RS 2584-5 and 2588-90, supra, relative to San Francisco Bay, Columbia River, and like areas, which treat similar navigable regions as "waters otherwise than . . . sea."

d) *Purpose of amendment of 1897*: The legislative intent is fully and helpfully disclosed. As noted in the introductory part of this brief (p. 3), the act of 1897 abolished the fees which RS 4382 had reduced to 50 cents for the entrance or clearance, "direct from . . . and . . . to a foreign port of a vessel navigating the waters of the . . . northwestern frontiers . . . otherwise than by sea." Though the pertinent part of the bill (sec. 9) was not

debated, it was the subject of Senate report 328, Feb. 20, 1896, and of House report 16605, May 7, 1896. The former is summarized in the House report as follows (p. 3):

> Section 9 abolishes the fee of 50 cents upon the entrance and clearance of vessels on the Great Lakes *and* on our northern borders in the foreign trade. Similar fees formerly paid by railroads have been abolished, and the lake shipping interests being in direct competition with the railroads, the railroads have a decided advantage in being exempt from this tax. The abolition of these fees will remove this unfair discrimination.

Thus the legislative intent was to remove an "unfair discrimination" against waterborne commerce "on the Great Lakes *and on our northern borders in our foreign trade.*" Conditions in the trade on the northwestern frontier at that time, as well as now, exactly articulated with the situation thus depicted. Two north-south railroad lines between Puget Sound and Vancouver crossed the frontier at Blaine and Sumas. At no point along the entire Canadian boundary could competition have been more inevitable. Like competition also existed along the Maine frontier.

In the light of this documentary evidence of purpose, only the clearest legislative expression could overcome the absurdity of the view that Congress intended to relieve discrimination along only a part of the "northern borders," when it existed as to all, whether on lakes, rivers, bays, or sounds.

3) **Administrative practice—customs regulations:**

a) *Regulations and rulings subsequent to RS 4382*: Soon after enactment of RS 4382 in 1871, the Treasury Regulations of 1857 were succeeded by Customs Regulations, 1874, and others, in the following series. The page citations refer to tables of navigation fees of general application and of fees pertaining to frontier waters:

1874, pages 545, 556	1908, pages 695, 698
1884, pages 597, 605	1915, page 482
1892, pages 515, 521	1923, page 568
1899, pages 666, 672	1913, page 160

By act of Feb. 14, 1903, c. 552, 5 USCA 600, jurisdiction over many subjects previously administered by the Treasury, including navigation fees, was transferred to the Secretary of Commerce; but fee collection remained a customs function, and pertinent regulations continued to be promulgated by the Treasury in various editions of customs regulations.

All these regulations were issued after revision of frontier fees in 1871, RS 4382; and the last five were subsequent to abolition of two of those fees (entrance and clearance) by act of 1897, supra. With the exception of the regulations of 1892, belatedly interpreted in 1898, and the regulations of 1915 and 1931, these various compilations were noncommittal as to the meaning of the term "otherwise than by sea;" that is, as in 1857 they merely used the language of the fee statutes, without direct or implied interpretation, though the inference is valid that the *Harriet* definition of "sea," cited in the regulations of 1857, was regarded as still in good standing. The ex-

cepted regulations of 1892, 1915, and 1931, together with special rulings of 1898 and 1936 by the Departments of Treasury and Commerce, will now be discussed chronologically.

b) *Customs Regulations, 1892 — Treasury Decision 19363**: After the customs administrative revision of 1890 (26 Stat. 131) had abolished most customhouse fees, the Treasury issued so-called circulars for use of local field officers, dated Oct. 11 and 14, 1890, and cited as TD 10275 and TD 10280. The former related to "customhouse fees on the sea-coast, gulf, and western rivers," and the latter was entitled:

> Table of custom-house fees at ports and places on the northern, northeastern, and northwestern frontiers of the United States—Vessels navigating otherwise than by sea.

These fee tables were not interpretive, and in that form were carried into the regulations of 1892 (pp. 515, 521), but are discriminately treated in TD 19363, of 1898, which is set forth fully in appendix A. That ruling consisted of a letter to the collector at Sitka, "relative to certain craft plying across the boundary of the United States and British Columbia." Instructions to vessel operators were given succinctly, thus:

> Touching the fees to which you refer, your attention is invited to section 4382 of the Revised Statutes and to chapter 30, regulations, 1892.

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*On July 1, 1899, TD 21335, the name Synopsis of Decisions was superseded by Treasury Decisions.

These regulations, as above noted, were taken from TD 10280, and related to the fees mentioned in RS 4382 for frontier navigation "otherwise than by sea." The only Alaskan waters open for "craft plying across" the Canadian boundary were tidal such as Portland Canal, a deep fjord about 90 miles long, now served by American and Canadian customhouses at Hyder and Stewart. Therefore the Treasury conclusion was that such waters were other than "sea" within the meaning of RS 4382. This harmonized with the *Harriet* definition of "sea" as not including ports or harbors on the Maine coast.

This point is emphasized by the further fact that the same ruling also covered "undocumented scows . . . towed up the coast from British Columbia, with lumber, etc."; that is, vessels which presumably traversed the open sea at Dixon Entrance somewhat south of Alaska, and perhaps a longer stretch of ocean north of Vancouver Island. As to that class of traffic it was held that the fees prescribed by RS 2654 for foreign trade in general should be exacted, the Treasury directing:

> The vessels should be entered and cleared, *and pay fees,* as prescribed by law. See "entries of vessels," etc., Cir. Oct, 11, 1890 (TD 10280).

The circular referred to was inserted in the regulations of 1892, later interpreted in TD 19363. The differentiation thus so carefully made by the Treasury in 1898 between vessels plying inclosed waters analogous to those of the Washington frontier and vessels which had passed through open sea makes the distinction for which petitioner here contends.

c) *Customs Regulations, 1915*: These regulations contained (art. 982) a "table of navigation fees," in which the only entrance and clearance fees specified were those from or to "foreign port, *other than Canadian.*" This was evidently based upon RS 4382 as amended, that being the only exempting statute for those fees; and as these regulations were of general application throughout the customs service, they pertained to the Washington area as definitely as to Lake Champlain. Thus we have another departmental pronouncement in harmony with the *Harriet* definition.

d) *Customs Regulations, 1931*: Article 208 declared:

> The fees . . . in column B are collectible on the northern, northeastern, and northwestern frontiers (*Great Lakes, Lake Champlain, and Saint Lawrence River*).

Said column B is blank opposite the items of entrance and clearance fees, but the limitation to the waters named parenthetically implies exclusion of tidal waters from the purview of "otherwise than by sea," and inclusion only of fresh-water lakes and rivers—and not all of them! This construction which, is not found in any others of the nine compilations from 1857 to 1931, above cited, in effect construes the provision for frontier "waters" in RS 4382 as though restricted to the frontier "rivers and lakes" specified in the act of 1831.

In addition to that inadmissible construction, the directive is too late to have an effective bearing on the interpretation of frontier-waters statutes, being 100 years later than the act of 1831, and 60 and 34 years later than

the enactment and amendment of RS 4382, in 1871 and 1897. Also, it was contrary to the Alaska ruling, TD 19363, supra, construing the regulations of 1892, to the regulations of 1915, and to the decisions in the *Harriet* and other cases. However, this subversive and tardy pronouncement did not remain long undisturbed, as will appear under our next heading.

e) *Commerce ruling, 1936*: On Sep. 19, 1936 (R. 66), the Department of Commerce said (R. 67):

> The whole question of the collection of fees for entry and clearance, etc., of vessels trading between Charlotte Country, (New) Brunswick, and the nearby American ports, seemed to hinge upon the correct interpretation of the phrase "otherwise than by sea."

"After a very thorough study of the entire matter," trade between the American ports Eastport, Lubec, and Calais, and nine named Canadian ports located on Campobello and other islands and on the mainland, and all touching the tidal waters of Saint Croix River or Passamaquoddy Bay, was "considered as traffic otherwise than by sea" (R. 67).

In principle, this decision applied to the analogous tidal waters of Washington and Alaska, and conflicted with the regulations of 1931, but was in harmony with the regulations of 1915, the Alaska ruling, and the *Harriet* decision, together with the presumed administrative and legislative adoption of that decision in the regulations of 1857 and later editions, and in the fee acts of 1871 (RS 4382) and 1897, as well as in the tidal-water statutes, RS 2584, etc., contemporaneous with RS 4382.

f) *In general*: The foregoing review of regulations, rulings, and legislative history demonstrates that the lower court erroneously asserted (R. 87):

> This ambiguity, however, has been settled by the consistent rulings of the department charged with the responsibility of enforcing the statute.

This result can be arrived at only by disregarding (a) the regulations of 1915, which applied indiscriminately to all frontiers; (b) the principle of the Alaska ruling (1898); (c) that ruling's interpretation of the general circulars of 1890 and the general regulations of 1892, which were in the language of RS 4382, and (d) the general regulations of 1857 and later editions, with their presumed adoption of the definition of "sea" in the *Harriet* and other cases.

Local customs officers, no less than the Treasury, Congress, and the citizen, are charged with knowledge of these pronouncements.

The case is well within the rule of *Interstate Commerce Commission v. Railway Labor Executives,* 315 US 373, where a construction by the commission was disregarded because, *inter alia,* it was inconsistent with its own previous interpretation.

Merritt v. Cameron, 137 US 547, involved a transaction in 1880 under a statute enacted in 1864 (RS 2931). This court said (p. 552) that:

> Neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts, unless such construction has been continuously in force for a long time . . . In regard to the law under consideration the construc-

> tion of it by the Treasury Department has not been uniform. The construction contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision.

Here the Treasury construction of the law under consideration has been uniform during virtually the entire period of its existence. The regulations of 1931 should be disregarded because too late, and the Seattle local practice during part of the life of the statute should be disregarded because contrary to Treasury and court rulings.

4) **Analagous statutes:**

a) *Legislative usage*: Statutes *in pari materia* are the basis of one of the strongest of all rules of statutory construction, because they are evidence of legislative understanding, which is necessarily paramount to the understanding of courts, administrators, or citizens, all of whom are bound by the legislative concept of meaning, however manifested. The leading case on this subject seems to be *US v. Freeman,* 44 US 556, 564, which states the applicable rule as follows:

> The correct rule of interpretation is that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts *in pari materia* are to be taken together, as if they were one law . . . If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute.

In the present instance the "divers statutes relating to the same thing" are numerous, as indicated by appendix B, in which we have gathered between 20 and 30 acts and treaties which have a range of more than 150 years, including the present Congress. They are pertinent because they deal with navigable waters, under such subjects as customs administration, commerce with Canada, Canadian frontiers, Alaskan waters, navigation in general as well as "by," "from," and "to" the sea, sea fisheries, crimes on "the land or at sea," load lines, inland waters, and collisions.

The chief implication from this collection of cognate citations is that Congress (from 1789) and treaty-makers (from 1782) have habitually employed the word "sea" in the sense of high sea; and in that regard the legislation has been consistent with departmental interpretations already discussed, and with court decisions which are mentioned in connection with those interpretations and will be presented more fully under a later heading (*stare decisis*).

Also, when the ocean and other waters were covered by the same legislation it has been customary either to use the all-inclusive term "waters," as in RS 2525, etc., or to describe specifically or regionally the various areas involved.

A specific enumeration is found, among others, in item 4 in appendix B, which mentions lakes, rivers, waters, sea-ports, harbors, bays, creeks, river ports, and mouths of rivers, with a distinctive reference to vessels "from the sea." Regional references are illustrated by RS 4382 herein

involved, covering waters on the various frontiers navigated "otherwise than by sea"; also, by RS 4221, 46 USC 113, 125, relating to vessels making daily trips between American and Canadian ports "wholly upon interior waters not navigable to the ocean."

b) *Inland waters versus sea*: Congress has persistently differentiated between high sea and territorial waters such as those of the Canadian frontier here in question. Evidence of this is found in testimony of Captain Woodley, master of one of the vessels of petitioner (R. 60), that federal licenses granted for masters are of these three classes: The *inland* license, for lakes, bays, and sounds; coastwise licenses, and *ocean* licenses; and that his own license was as "master on lakes, bays and sounds." That is, for some federal purposes the areas here in question are regarded as "inland" and not "ocean."

Further evidence of a fluctuating administrative concept of where "sea" begins along the northwestern frontier is afforded by collective exhibit 11 (unprinted, R. 61), consisting of certificates of inspection produced by Captain Woodley. It is interesting to note from those documents, that at the same port where the customs service regards the waters in question as "sea" for fee purposes, the Bureau of Navigation and Steamboat Inspection has issued certificates of inspection containing references to "*inland* mate" and "*inland* mate and pilot," and permitting the vessel to navigate "the waters of Puget Sound and *adjacent inland* waters between Olympia and Powell River, B. C."

Another statute, which though it does not use the term "sea," is likewise discriminating, is the neutrality act of 1939, 22 USC 443 (f), relative to commerce in general, unless on "lakes, rivers, and inland waters bordering on the United States." This was interpreted by the Commerce Department as including trade with "Canadian ports on inland waters," and the Seattle collector held that this included "vessels from Puget Sound to Vancouver, B. C., and any other Canadian ports which are located on the Straits of Juan de Fuca, Washington Sound and the Gulf of Georgia" (exhibit 10, R. 77-8).

The court below seemingly gave some recognition to the rule of *in pari materia* in a reference to the collisions acts of Aug. 19, 1890, c. 807, sec. 1, 26 Stat. 320, and June 7, 1897, c. 4, sec. 1, 30 Stat. 96. These acts related to collisions; and the earlier one provided that certain "regulations for preventing collisions *at sea*" should be followed "upon the high seas and in all waters connected therewith navigable by seagoing vessels," but it was provided that after adoption of special rules the regulations should not apply to:

> The harbors, rivers, inland waters of the United States, . . . the Great Lakes and their connecting and tributary waters as far east as Montreal, . . . the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries.

The court below said (R. 88):

> It will be observed that under this act collisions are "at sea," though they are not on the high seas but are on inland waters. The rules provided by the act of 1890 governed both inland waters and the high

seas until the adoption of the special rules for inland waters provided for as above.

As thus construed the term "sea" would include not only the "seven seas," but nearly all important territorial waters of this country, including, for example, the Brazos, Tombigbee, Ohio, Potomac, Hudson, and Charles rivers. "Sea" as thus used would be a misnomer so enormously distorted from its common significance as to prove nothing concerning its meaning in another context.

Further, though as said by the court the rules of 1890 temporarily "governed both inland waters and the high seas," that did not mean that the former were "sea," but merely that for the time being they would have the status of sea. A parallel provision in the current tariff act, 19 USCA 1001, par. 804, is that still "wines containing more than 24 per centum of alcohol shall be classed as spirits and pay duty accordingly." Clearly, fortified wines do not thereby become "spirits," a term which would never be applied to wines in common speech, regardless of alcoholic content.

c) *Legislative aims*: As to the many statutes relating to Canada, their apparent aims have been to regulate commerce across the frontier, promote the good-neighbor policy, and remove commercial hindrances. Under RS 4382, the fee statute involved in this litigation, these considerations are as pertinent to the salt-water frontier of Maine as to its fresh-water frontier, and as pertinent to the frontiers of Washington and Alaska as they are to the intervening continental boundary.

5) **Common meaning of "sea"**: Neither side has attempted to prove a technical or scientific meaning of the word, and obviously its common meaning should prevail. Its use is so widespread as to be in the consciousness of everyone. Dictionary definitions are not especially helpful, because they cover all uses of the term, without indicating the most common one. In some contexts of broad implication, such as "land, sea, and air," it would cover all waters of the earth.

The Century Dictionary's first definition of "sea" is:

> The salt waters that cover the earth; the ocean. (The word "sea" in compound words always has the meaning of "ocean.")

This definition makes "sea" and "ocean" synonymous, and is undoubtedly the one most commonly used, not only in common speech, but in relevant decisions and statutes. Its references to "ocean" suggest that this definition was not intended to include all inclosed bodies of salt water, especially if of small area, such as those here under consideration; for in common speech the word "ocean" is not used in that sense. While the Potomac River contains salt water, one would hardly speak of a trip thereon to Mount Vernon as an ocean voyage or a sea voyage. Nor would the islands in that river be referred to as seagirt. San Francisco would be said to be bounded by the sea on the west, but not on the east. Long Island is bounded by the sea on the ocean side, but according to decisions by Judge Betts the waters of New York lower bay are not sea. (See *The Wave* and *The John Gilpin*, items 9 and 11, appendix C, p. xi).

It hardly need be added concerning common use of this very common word that no literate person would speak of San Francisco Bay or New York Bay and their connection§or borders as "sea," "seashore," "seacoast," or "seaside." They do not contain sea water or river water, but a mixture of both, known as bay water; and commuters, yachtsmen, and fishermen, whose craft ply the waters of those bays, would encounter derision if they referred to these mild adventures as "*sea* voyages." This is no more true of these local areas than of analogous frontier regions of Maine, Alaska, and Washington.

The opinion below says (R. 87):

> These waters are all tide waters and are arms of the Pacific Ocean . . .

Anatomical terms, when applied figuratively to bodies of water, are confusing and liable to be misleading; as where a so-called arm of the sea enters the mouth of a river or constitutes the foot of a bay. In those phrases "mouth" and "foot" are not terms of addition, but the contrary is true of "arm" as applied to "sea." In strict phraseology, the sea, the river, and the bay is each a separate entity, and each stops where one of the others begin.

6) **Stare decisis**: This important principle applies here because of numerous decisions and judicial dicta as to the meaning of "sea," "at sea," and like terms, which should be followed because authoritative, and because most of them antedate RS 4382 (1871) and its amendment in 1897, at which times Congress presumably acted in the light cast on the subject from so many sources.

In appendix C (pp. ix-xiii) are collated 23 cases, dated from 1786 to one decided by this court in 1942, which abundantly evidence widespread judicial use of "sea" for "high sea." As only the common meaning of the word is relevant, the casual observations of jurists, either in majority or dissenting opinions, as evidence of everyday usage stand on virtually the same level as their formal conclusions. Likewise, the unpremeditated use of the term in argument or in editorial syllabi or statements of cases, and by witnesses, all have evidentiary value. Therefore the many cases in the appendix have been selected without regard to whether the meaning of "sea" is actually declared therein, or is implied by context or otherwise. Those cases are harmonious both among themselves and with the many indications of legislative understanding mentioned under the previous heading (analogous statutes).

It is not doubted that respondent will be able to show that in special contexts the term has occasionally been used otherwise, as in insurance policies; for as said in *Bowen v. Hope Ins. Co.,* 20 Pick. (Mass.) 275, 278, an insurance case:

> The term "at sea" may have different meanings, according to the connection in which it is used.

To illustrate, RS 1556 prescribed the pay of naval officers according to whether they were "at sea" or on "shore duty," and RS 1571 defined "sea service" as being "such as shall be performed at sea." Under the compulsion of choosing the more appropriate of these two terms, the courts naturally held that service on a vessel, wher-

ever located, was "at sea," rather than on shore. In that regard it was said in *Engard v. US,* 1903, 38 Ct. Cls. 712, 715; affirmed, 196 US 511:

> The statute relating to sea pay (Rev. Stat. 1571) is sweeping in its terms, but in neither departmental nor judicial interpretation has it been taken literally. A ship at anchor is not a ship at sea; a ship sailing up a river is not a ship at sea; a ship in service on inland waters is not a ship at sea; a ship hauled up on a dry dock in a foreign port is not a ship at sea; a ship fighting her way up the Mississippi in 1862 was not a ship at sea; yet in all of these cases it has been held by the accounting officers or the courts that officers serving on such vessels were entitled to sea pay—that a ship at sea means nothing more than a ship afloat, she being at the same time so commissioned, authorized, and organized as to be able to render some kind or other of marine service.

Further, in *US v. Rodgers,* 1893, 150 US 249, it was held that the analogous term "high seas" in a crimes statute, should be construed as including the Great Lakes, and it was said (pp. 255-6):

> Whether the term is applied to the open waters of the ocean or of a particular sea, in any case will depend upon the context or circumstances attending its use, which in all cases affect more or less the meaning of language.

That decision required a stretching of language which is not involved in petitioner's contention that here "sea" should be construed as "high sea." This is emphasized by the fact that the Great Lakes, though "high seas" within the meaning of the statute construed in the *Rod-*

gers case, are the principal body of waters "otherwise than sea" covered by RS 4382 and other frontier statutes. So, they are both sea and non-sea, according to whether the involved vessel is the scene of crime or the subject of navigation fees!

The "context" mentioned in that case applies here, because of the specification of the "northwestern" frontier, in RS 4382, and the use of "sea" in the sense of high sea in many cognate statutes. And "circumstances" apply, because of the purposes and liberal policy involved in simplifying and otherwise easing the complexities and burdens of commerce with a friendly contiguous country.

Also specially significant, because rendered during a period (1831-45) not long antecedent to enactment of RS 4382 in 1871, are items 9-11 of appendix C, referring to three decisions of Judge Betts* in the southern district of New York, who enjoyed the same high reputation in maritime matters as that of Mr. Justice Story. In addition to implying that sea meant high sea, he specifically indicated that vessels in the lower bay of New York, inside Sandy Hook, were not at sea. Recognition of Sandy Hook as one of the *faucès terrae* for those waters is found in item 12, relating to a decision by Judge Hough in 1909.

Of greatest significance, because of the timely period of utterance and the number of instances, is the group of five cases (items 13-7) reported in 5 Wheaton. Chief among these is the *Wiltberger* case (item 13), wherein Chief Justice Marshall indicated that "seas," "the sea,"

*It is said that "during his first 20 years on the bench . . . no appeal was taken from any of his decisions" (30 F. Cas. 1363).

and "at sea," meant high sea. A scholarly footnote of great length, apparently by the chief justice, discusses cognate subjects of English law for several centuries; and even if his references are only dicta, nevertheless they show his understanding of a term that had often received the attention of his court. These circumstances entitle them to great weight, especially as Story, then in the midst of his five cases above mentioned, culminating in *The Harriet*, was a member of the court at that time, and cited the *Wiltberger* decision in that case.

Also, in the four other like cases in 5 Wheaton (items 14-7), in which "sea" is used in the sense of high sea, the writers of the opinions were respectively Justices Marshall, Story, Johnson and Washington. This indicates that the usage was that of a majority of the court, then consisting of seven members, rather than the viewpoint of a single justice.

In regard to item 22 (*The Pilot*), it is interesting to observe that though the court below now regards Fuca Straits as "sea," *in 1892 the same circuit court of appeals made a distinction between them and "sea."*

Specially noteworthy among the cases cited in appendix C are items 1 to 5, consisting of five early decisions (1818-40) by Circuit Justice Story, in Maine and Massachusetts. in these he implied that Boston outer harbor, "the main stream of Salem Harbor," the port or harbor of Saint George, Maine, and a sound near Portland, are not sea; and in item 1 (*The Harriet*) he definitely ruled that a vessel was not "at sea" until it had left port and was out beyond the headlands (*extra fauces terrae*). Sixty-nine

years later that case was followed by Judge Nelson, in *The Helen Brown* (item 7), who stated that:

> To "depart from port," "to leave port," "to go to sea," are phrases which, in popular speech, have the same significance. . . . In going to Lynn the Helen Brown went outside the headlands and lighthouses which mark the outward geographical limits of Boston Harbor, and entered Massachusetts Bay. She was then upon the high seas; she had left her port and had gone to sea.

Thirty-three years later the same understanding was exhibited by this court (item 20) in the mutiny case (*Southern SS Co.*),* where the term "at sea" was used four times in the sense of "high sea," and in contrast with such terms as "port" and "harbor."

7) **Summary**: The foregoing review proves a wide and exceedingly protracted usage of the term "sea" in the sense of high sea, by Congress, treaty-makers, federal judges, and departmental administrators. It further shows that the waters of the Washington sector involved in this litigation are "inland" according to the neutrality statute, and are "sheltered" according to the load-line convention with Canada; also that the master's license for that region is for "inland waters—lakes, bays, and sounds," rather than "ocean" or "coastwise," and that petitioner's

*The distinction between harbor and sea, in this and so many other instances cited in ths brief, receives professional confirmation from America's most distinguished A. B. seaman, in Two Years Before the Mast, by Richard Henry Dana, Jr., who in chapter 14 compares "harbor duties" with "those at sea," and elsewhere often uses the word "sea" in the sense of high sea.

vessels are authorized by the steamboat inspection service at Seattle to have "inland" officers and to navigate Puget Sound and adjacent inland waters." This sharply refutes the lower court's views as to "uniform" practice by local administrators to regard the waters in question as "sea."

ARGUMENT—PART II

1) **General fee abolition:**

The issue here raised is alternative to the one already discussed, and the line of argument is entirely different. Therefore, as indicated above (p. 4), it is here presented separately.

The same question was passed upon adversely to vessel owners, by the same court, in *Carriso v. US,* 106 F 2d 707; but, there being no reason for regarding a different result as possible, the particular point was not reargued in the instant case. However, it is raised by the pleadings (R. 7, 24); and, as it involves a principle affecting every foreign entrance and clearance in every customs district navigable from the ocean (while the issue already argued involves only frontier waters), this phase of the case is believed to present a federal question of sufficient importance to justify intervention by this court. At this time only a brief review of the subject will be attempted.

(a) *Fees in question*: The same entrance and clearance fees are involved as those above considered, which were exacted under RS 2654, originally enacted in 1789, and set forth supra (p. 2). The language of that section is not here involved, the only question being whether, as con-

tended in the *Carriso* case, the section was repealed by the tariff act of 1913, sec. iv, S. 38 Stat. 201, which reads as follows, so far as pertinent:

> S. That except as hereinafter provided, sections 1 to 42 both inclusive, of an Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, and all Acts and part of Acts inconsistent with the provisions of this Act, are hereby repealed:
>
> *Provided,* That nothing in this Act shall be construed to permit any oaths to be demanded or fees to be charged except as provided in this Act or in section 2862 of the Revised Statutes of the United States, nor to repeal or in any manner affect the following numbered sections of the aforesaid Act approved August 5, 1909, viz: . . .

Appellant in that case contended that this proviso, though negative in form, had an affirmative significance. This contention was based upon history of the particular provision as well as of the reform of the fee system, also on the context of the section and its own intrinsic import.

The "sections 1 to 42" which in the main part of paragraph S are mentioned as being "hereby repealed," were the entire tariff act of 1909, and did not include any provisions of the Revised Statutes.

RS 2862, now 19 USC 340, which is specified in the proviso, authorizes consular officers to "require . . . the oath of the person presenting" an invoice for certification. As it was not one of the sections repealed in the first part of paragraph S, it did not need to be saved from

repeal by the proviso, unless the latter by its own vigor had the effect of abolishing customs oaths, including the consular oaths on invoices for imported goods under RS 2862. If, as Congress seems to have supposed, the proviso would have abolished "any oaths to be demanded" for customs use, then it would have the same effect upon "the fees to be charged except as provided in this act." The only important customs fees which might be affected by that language would be navigation fees such as those for entrance and clearance of vessels, as specified in RS 2654, which section, like 2862, was not one of the forty-two repealed by the first part of paragraph S.

As summarized in the opinion in the *Carriso* case (p. 711):

> Appellant quotes from Tariff Hearings, Committee on Ways and Means, 62d Congress, 1913, House Document 1447, pp. 6304, 6337, testimony of a witness (James F. Curtis, Assistant Secretary of the Treasury) to the effect that, in his opinion, subsection 21 of sec. 28 of the Act of August 5, 1909, "abolishes fees, except as specifically retained," and that the plan of reorganization which the President then had under consideration "will abolish the whole fee system if the President approves it."

Further, appellant showed that in the tariff bill as passed by the House the proviso, like the preceding part of paragraph S, referred only to the tariff act of 1909, but that as reported by the Senate Finance Committee the proviso had been amended by insertion of italicized matter as indicated as below:

> Provided, That nothing in this Act shall be construed *to permit any oaths to be demanded or fees*

> *to be charged except as provided in this Act* nor to repeal or in any manner affect the following numbered sections . . . viz.: . . .

Further amendment occurred on the floor of the Senate (Cong. Rec., 63d Cong., 1st sess., p. 4385), so that as enacted the proviso contained the additional matter indicated by italics below:

> Provided: That nothing in this Act shall be construed to permit any oaths to be demanded or fees to be charged except as provided in this Act *or in section 2862 of the Revised Statutes of the United States* nor to repeal or in any manner affect the following numbered sections . . . viz.: . . .

The appellate court in the *Carriso* case apparently did not regard the reference to RS 2862 as of any significance; for it is omitted from paragraph S as quoted in the opinion, and its history is not referred to (p. 711). That court's conclusions are stated as follows (i.d.):

> Thus sec. 4 (S) of the Act of October 3, 1913, repealed, inter alia, subsection 21 of sec. 28 of the Act of August 5, 1909, but, in repealing subsection 21, Congress did not intend to reestablish the fees which subsection 21 had abolished. To make this clear, it inserted in sec. 4 (S) the proviso that nothing in the repealing act should be construed to permit any fees to be charged. The fees referred to were those abolished by subsection 21, namely, the fees which formerly were exacted upon entries of *goods*. Section 4 (S) did not abolish any fees. It merely forbade a construction which would have reestablished fees previously abolished. It did not mention or refer to, much less repeal, sec. 2654 or sec. 4186 of the Revised Statutes.

It is thought that in view of the considerations above set forth the treatment of RS 2862 does have significance. Also, important criticism may be made of what seems to have been the crucial reason for the conclusion reached, to wit:

> Section 4 (S) did not abolish any fees. It merely forbade a construction which would have reestablished fees previously abolished.

This gives no weight to the fact that RS 12, 1 USC 28, provides:

> Whenever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided.

Therefore, as Congress is presumed to know the law and may be regarded as particularly conversant with general provisions bearing on the formulation and meaning of repealing acts, the conclusion in the *Carriso* case as above stated, disregards a strong presumption.

Also disregarded were various well-established principles of construction and supporting decisions, as follows:

b) *Negative expressions may have positive force*: As said in 2 *Lewis' Sutherland on Statutory Construction,* 2d ed. 637, sec. 332:

> A negative statute is one expressed in negative terms, and here the rule prevails that if a subsequent statute, contrary to a former, has negative words, it shall be a repeal of the former.

In this instance, the subsequent statute is the proviso, and it is contrary to the former statute, RS 2654, which under the rule stated would be repealed.

In *Alton Railroad v. US,* 287 US 229, 235, it was recognized that an "order while negative in form was, in effect, an affirmative one."

Manning v. Keenan, 73 NY 45, construed a provision that an officer should *not* be bound to keep property, *unless* indemnified by plaintiff. The court construed this provision as though reading "shall be bound."

c) *Exceptions imply something from which exception can be made*: In *Brown v. Maryland,* 25 US 419, 438, Chief Justice Marshall referred to:

> A rule of interpretation to which all assent, that the exception of a particular thing from general words proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made.

The purpose of an amendment is to amend, and of an exception is to except; that is, by a change in meaning of the main provision, to achieve some end. Here we have an amendment, an amendment to that amendment, and an exception which qualified both amendments. If the end intended to be achieved included abolition of fees, these amendatory actions will bear fruit accordingly. If the contrary, then those multiplied legislative efforts will be sterile.

d) *Every part of a statute must be given effect*: The new context was added deliberately, in two separate and distinct steps; first by the Finance Committee upon reporting the bill to the Senate, and second on the floor of the Senate. The offspring of such lineage is presumptively viable, and this vitality is heightened where, as here,

by a second amendment, the inheritance has, so to speak, descended to another generation. Purpose must be imputed and must be given effect. Otherwise Congress would be deemed to have acted to no purpose by making an amendment which had no function. This would be irrational as well as contrary to legal principles.

In *Ogden v. Strong,* 18 F. Cas. 616, cited in *US v. Reese,* 92 US 214, 244, it is said (p. 617):

> It is a general rule of construction, that every part of a statute must be viewed in connection with the whole, so as to make all the parts harmonize, if practicable, and give a sensible and intelligible effect to each. It ought not to be presumed that the legislature intended any part of the statute should be without meaning, or without force and effect.

Also pertinent is this statement in the same case concerning the fact that under a certain construction a portion of the law "*would be superfluous*" (p. 618):

> And a statute ought never to be so construed as to draw after it such consequences, if it will admit of a construction which gives effect and operation to every part. Such must be presumed to have been the intention of the legislature, and not that any unnecessary and *superfluous provision had been made.*

It is suggested that the foregoing shows important additional reasons for intervention in the instant case by this court.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be issued herein.

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